



FIGHTING OVER THE LAW OF WAR

By Jonathan Gumz and JP Clark April 28, 2020

<https://warroom.armywarcollege.edu/podcasts/occupation-resistance/>

Welcome to **WAR ROOM** the official podcast of the U.S. Army War College Online Journal. Graciously supported by the Army War College Foundation, please join the conversation at warroom.armywarcollege.edu. We hope you enjoy the program.

The views expressed in this presentation are those of the speakers and do not necessarily reflect those of the U.S. Army War College, the U.S. Army, or the Department of Defense.

JP Clark: Hello, and welcome to A Better Peace the War Room podcast. I'm **JP Clark** Deputy Director for Academic Engagement at the Strategic Studies Institute and a War Room Senior Editor. One side's terrorist is another side's freedom fighter. Though a bit cliché the phrase highlights the uncomfortable subjectivity that often exists at the edges of conflict and also suggests that the views and ideas about the law of war might, at least in part, reflect the relative strength or weakness of the observer. But all too often we assume that our present national outlook on such matters has been both constant and universally shared. To help illustrate how this is not the case, we're joined today by **Dr. Jonathan Gumz** Senior Lecturer in Modern History at the University of Birmingham. Dr. Gumz is primarily a historian of modern Central and Eastern Europe does his interests also include global insurgency and counterinsurgency and to today's topic, the regulation of war. Prior to his current position, he was an Assistant Professor at West Point and holds a PhD from the University of Chicago. John, thanks for coming on into the War Room.

John Gumz: Thanks for having me, JP.

JPC: So, we are going to take our listeners to two points in time: the Hague Conference in 1907 and then the Geneva Conference after World War II. We'll take these in turn. So first, give us just a quick summary of what attendees at the Hague were trying to accomplish.

JG: First thing that those attendees at the Hague we're trying to accomplish was to actually get an agreement. What had happened before in 1874 in Brussels was that it collapsed, the conference collapsed. There was just a declaration, there wasn't an agreement. So, they wanted to get an agreement that would codify what was already customary international law. That was the main goal.

JPC: So, trying to put some restraints upon aspects of warfare that were viewed as being a little bit threatening or a little but barbaric.

JG: I think the broader point here is that, and especially certain delegates there, are trying to a) restrain warfare, others are trying to contain warfare which had, in their mind, kind of broken out dangerously uncontrolled in the Franco-Prussian War in 1870.

JPC: Okay.

JG: The idea was essentially to kind of maintain the boundary between soldiers and civilians, and then part of this, how do you regulate something like military occupation where this boundary is much more fluid and much more dangerous?

JPC: Alright, so it's a perfect setup as we go forward but just for a little background for the listeners, the Franco-Prussian War, the Prussian armies had succeeded fairly quickly in the field but then there'd been a period of resistance which kind of scared everybody both the French and the what's going to become the Germans after the unification.

JG: Right, that's right.

JPC: Alright, so we have groups that are just trying to kind of go towards the road of getting rid of war altogether and others that are just trying to make it a little bit more tidy. So, we come into this within the conference, a couple of different controversies. But one of them is about occupation and resistance. And with that background of the Franco-Prussian War there, what was the sticking point and who kind of tended to come down on either side?

JG: The sticking point... there were two main sticking points. One was what happens during an occupation? What was the law that applied during an occupation? How was a conquered territory or a subjected territory to be governed during an occupation and who was to be governing that territory? That was one sticking point and the question came up over and over again, well, we need to leave the local government in place during an occupation because in theory, this was an occupation that would only be temporary. War could not transfer sovereignty. That had to be agreed upon afterwards and so even though a country was occupied, its sovereignty was left in place. So, this was the notion of the so-called trustee occupation. So, that's one sticking point. And there were a lot of disagreements over this because some countries thought, well, essentially what you're making happen here is to have the defeated country govern for the conqueror, and this is essentially a betrayal of nationalism, patriotism, so on and so forth. You're trying to transform as what one delegate said transform what's *fact* into *law* and that was dangerous.

JPC: Indeed, and although to draw on that point, so dangerous for who?

JG: It was particularly dangerous for countries that thought that they would be conquered.

JPC: Yes, okay.

JG: Or defeated in a war.

JPC: Right, and now so how is this going to eventually be resolved? As we have this discussion about what is the responsibility of the side that is being conquered, the side that is conquering and the people who are caught up in this whole thing, how is this resolved?

JG: Well, the people are caught up in this whole thing. This is then the next kind of sticking point. In other words, what are the limits of legitimate resistance? There were a lot of discussions over this. Some delegates wanted to essentially legitimize resistance all the way through. Others said, well we can only have resistance in the kind of gap between an advancing army and a retreating army. And at that point, civilians were allowed if they conformed with the laws and customs of war to take up arms against that advancing army. But other countries also said, after we get past that point and we've established an effective occupation over a particular territory, at that point, resistance has to stop. And these countries were of course tending to be more of the kind of European landmarkees, so we're talking about Germany, Austria-Hungary, also Imperial Russia on this. And they were essentially facing off against Belgium to a large degree in the discussions over this.

JPC: So, where you stand is where you sit, and in this case, it's the countries that are the stronger versus the weaker.

JG: I think in some sense, JP, I think what we want to say here is that it's like this in terms of it can be twisted in the sense of, well, if you're stronger you think this way and if you're weaker you think that way, but of course, we know that the British actually ended up supporting the Belgians at the conference. Britain being actually the premier power in the world at the time, in a strange way, actually kind of cuts against this logic of stronger versus weaker there. It's really a kind of perspective on war itself, one side believing that the only way to kind of contain war is to keep this highly clear boundary between soldiers and civilians. If you were to allow kind of fighting to take place after occupation and after it's been established, this boundary would essentially blur all over the place and that this has to be stopped because this is essentially a memory of the Napoleonic Wars in a lot of ways.

JPC: Yeah, and as your article points out, it was also was a bit strange that the British would take that in view of their own experience in South Africa in what we commonly call the Boer Wars which it had this long period of resistance and so they were one of the last ones to have had this headache of prolonged resistance, but yet they saw that as being legitimate.

JG: Exactly.

JPC: Alright. Now, before we move on, one thing we should note about this early discussion within the Hague, this was not necessary universally applicable from the standpoint of these Powers. Who was excluded from this in their idea?

JG: At this point in time, in European history, there was a very clear sense of what was called the Circle of Civilization or the Realm of Civilization. Civilization essentially applied to Europe, also the United States, also interestingly, one bigger project is, there were countries that were kind of on the boundaries of civilization, and where exactly they stood was always a question—the Ottoman Empire would be an example of this. But it was clearly demarcated. The right to be occupied was in a sense, a right only reserved for a so-called civilized country.

JPC: Okay. Now, so things to be set, one of the phrases that is used is “Contained Warfare” and so really kind of gets at this idea of the ideal, of being able to put the things in the proper box. Then, as with many things, the Nazis messed all of this up because they had absolutely no intention, you know for them, warfare was rewriting the rules and sovereignty, so it wasn't going to be something that was done in a peace treaty later on. Once their armies moved through, they were rewriting the rules and getting rid, in a horrific fashion often, of the local ruling elites, as opposed to what had been envisioned at the Hague. So, when we get into Geneva, how did the experience of occupation and resistance to that Nazi regime affect and alter the perspectives on what was lawful?

JG: Well, I would say several things here. First of all, the National Socialist believed that war is an elemental contest. An elemental contest which this kind of international legal project connected with liberalism essentially covers over and deceives us in a way. It's not actually an elemental contest between various powers and that's it. So, they kind of push through it that way. Then we get to Geneva and at Geneva and the years prior to Geneva, there's a concern especially among particular countries, those that have been occupied and in particular, those occupied in Western Europe, that the memory of resistance be legitimized. A memory resistance as opposed to the actual history of resistance are two different things and we have to remember that resistance in these countries was often highly fraught, think especially in terms of France for instance. In France Communists were really at the forefront of resistance to the National Socialists after the invasion of the Soviet Union. Of course, it is a very different context post-World War II with the Cold War involved. And in some senses, the idea is, I think among some of these countries, it's to kind of legitimate resistance, legitimate their memory of resistance and do it in a comfortable, easy sphere and that's the sphere of international law. Because doing it in the sphere of domestic politics is actually much more complicated and much more fraught as the kind of experience of post-war societies—1945 in Europe—demonstrated.

JPC: Indeed. To kind of restate that a little bit, often we just lose sight of how much turmoil there was after the war in terms of a lot of these Western, Central, Eastern European, all across Europe, the societies where they were really coming together so legitimating the resistance was not just an emotional imperative, although certainly there was that. As they're trying to knit back together societies and political systems that had been shattered, it has a domestic political overtone as well as you said that in order to kind of rally around potentially a myth of national resistance. So, that is one pole that's driving some of the European powers. But some others are also trying to hold on to their empires, and so what does resistance mean for powers like the UK and for France?

JG: Yeah, this is a very interesting question. In some senses you can divide countries at Geneva and the preparatory conferences to Geneva between countries that had been occupied and countries had not been occupied and, in some sense, the interesting thing is that this cuts across the Cold War line in a lot of ways. The U.S. and the UK in particular had different perspectives on international law to begin with. I mean in some senses they were very conservative approaches to international law. The U.S. after 1945 actually, as they were starting to hear talk of the need for reform to international law in the light of the experience of the second World War actually says, we actually don't have to change much at all. We just have to work around a few of these little problems and make some alterations, but we don't have to change much at all. The UK of course—remember by the time we get to the late 40s—is dealing with various post-colonial insurgencies, and in places like Malaya and so on and so forth. And they are concerned that alterations to the law at Geneva will affect their own suppression of these insurgencies because it's a question of whether or not the Realm of Civilizations still applies or not. The more the Realm of Civilization breaks apart and applies to the whole world, the more problematic it is for a country like the UK. The ironic thing is that the French do not believe that this would apply to their insurgencies in part because they still believe that this civilizational imperative existed.

JPC: Fascinating. This is interesting and so many of the nationalities after World War I at Versailles had kind of come to the table and they were really believing that Wilson's 14 points was going to be equally applicable, and then obviously, there had been a large caveat attached to that at least within the mines. We tend to think that our current view, that of course, international law truly is international, has been around for a while. But so, we're at a transition stage you think in Geneva where some sides are starting to realize that they really have to apply these things universally and others don't? Is that a fair statement?

JG: Yeah, I think that's a fair statement. That's a fair statement and the ironic thing, another ironic thing at Geneva is that many of the newly-independent countries, so let's say a country like Burma, is actually very concerned about allowing resistance to occupation or allowing, let's say, guerrilla warfare, because they themselves are so uncertain about their control over their own territory.

JPC: Fascinating. What was the resolution at Geneva within the conventions?

JG: At the Geneva Conventions, the key article in this respect was Article 4: on the Treatment Relative to Prisoners of War. And what it did was this: it extended prisoner of war status to members of other militias and members of other volunteer corps including those of organized resistance movements belonging to a party to the conflict and operating in or outside their own territory even if this territory is occupied. So, what does that do? Essentially what it does is it removes, in an international legal sense, the notion of risk which it had always been around in resistance to occupation. It's not that all resistance to occupation would have to be crushed, but there was risk attached to it if you undertook it. This in a sense removes that notion of risk to resistance to occupation.

JPC: Going back to the Hague a little bit, the lawyerly bit is fascinating. You would reference that particularly, it was fairly clear that civilians had organized ahead of the occupying Army coming in, everybody kind of realized that that was okay, and then there was this gray zone as the lawyers are trying to figure out exactly how far into an occupation resistance no longer becomes legal, but then the Geneva conventions gets away with that distinction completely. So, to drive this down to the lowest possible common denominator, as we have the Wolverines of Red Dawn, under the Hague Conventions because they had not organized ahead of time to resist the Cubans and the Russians, they were kind of within a gray zone. However, after the Geneva Conventions, even if they organized and start resistance afterwards, then they should be treated as prisoners of war rather than executed somewhere as bandits or anything like that.

JG: Or even arrested.

JPC: Yes. Oh okay, yeah okay because they are not combatants. Okay. I think that we can see, particularly from our own vantage, there are some advantages to this older notion of contained warfare particularly for larger powers. What are the implications for the United States in an era of counterinsurgency and small wars that we have this change? In your article you point out there's definitely a correlation and there's some sort of causation involved with these larger changes in geopolitics and international law and entering into the era of counterinsurgency. What should we draw from this? Particularly a lot of our United States Military Officers are listening to this.

JG: I think often times in the way we talk about international law, we like to believe that it's a question of international law being on the side of weak powers. International law is a kind of weapon of the weak. If you think of the most extreme way that one could talk about this from the perspective of strong power is to say, we have to throw off the shackles of international law because we have to handle these difficult situations and international law doesn't recognize this so on so forth, and in that way, we tend to think of international law in that way as a weapon of the weak. Ironically also, there are advocates for international law which pose it against the strength of the state.

JPC: And it's currently how it's kind of framed as we talk about all of these international treaties right now tends to be the left is viewing it as a restraint on our power and the right is viewing it as too restrictive and so they reject it.

JG: And I think that the interesting thing and what you can draw from this is how major powers viewed international law as something that they could control and deploy in their favor, and not simply in a cynical sense, but in the sense of how they viewed war needing to progress, and how war was safest and these powers used international law in that way in order to kind of impose their vision of what war should be like. And so, in this sense, I think what we can think of here is that international law can actually be a very powerful tool in the regulation of warfare.

JPC: Indeed. So, we have both international law reflecting what we want war to be and also perhaps to keep at bay what we fear war might become. In both cases it's certainly reflecting the recent experiences towards that, and you can clearly see why they came to these. These aren't esoteric, out-of-time experiences. It's based off of either the late 19th-century, and as you said, maybe even going all the way back to the Napoleonic period really and then World War II. So, as we see conflict, there's discussions about whether the character of warfare, war is changing with our own time period. So, now that we see that these things change and are not immutable, what sorts of conditions do you see in the future that would lead to another wholesale change in international law, in how we regulate war? And what could be the watershed moment coming up and what would precipitate that and what might it look like?

JG: Well, that's a good question, it's sort of also at one level an impossible question to answer of course. But I think, thinking back to this moment that we looked at in this discussion, it's coming out of a broader consensus around the authority of the state and a broader consensus around sovereignty that exists, and it is quite powerful and strong and then is later codified into international law. And so, the question is, I think for us today, is will we see a reassertion of the authority of the state and the centrality of the state and sovereignty in terms of warfare, but also more broadly in society in various ways. I mean in some ways you can look at the period since the 1970s as a build down of the authority of the state and then, in some senses, maybe you think, you ask yourself, well maybe this is kind of caught up with the inability to control warfare in a way. And so, the question is what could be the moment at which you have this development of a kind of restoration of the authority of the state? That I don't know. It's fascinating to think about whether there is an international consensus upon it, and you can see perhaps a splintering of the states versus some of the non-states as we certainly see. Although even though with ISIS, it's interesting that they want to gain those state-like characteristics.

JG: That would precisely put them in jeopardy.

JPC: Yeah. Well, as with many things in history, irony is abundant all around. And so, this has been a fascinating conversation. Thank you very much, Dr. Jonathan Gumz for coming into the War Room and sharing some of your perspectives on these things with us.

JG: Thanks for having me, JP.